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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
vs. ERIC OGILVIE,
Defendant.
_____/

File No. 09-25646

Motion

PROCEEDINGS TAKEN in the
above-entitled cause, before the HONORABLE PATRICIA
FRESARD, Judge of the 3rd Judicial Circuit Court, City of
Detroit, at Frank Murphy Hall of Justice, Courtroom 804,
Detroit, Michigan, on November 5, 2010.

APPEARANCES:

JON WOJTALA, Assistant Wayne County
Prosecutor, appearing on behalf of the
People.

JAMES LAWRENCE, Attorney-at-Law, appearing
on behalf of the Defendant.

* * *

ANNETTE L. SEGUIN, RPR/CSR-2184
Official Court Reporter

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T A B L E O F C O N T E N T S

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None.

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November 5, 2010

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Detroit, Michigan

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10:18 A.M.

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(Whereupon Defendant is not present)

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COURT CLERK: This is Docket Number

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09-25646, People versus Eric Ogilvie, here today for a

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motion hearing.

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MR. LAWRENCE: Good morning, your Honor.

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I'm attorney James Lawrence representing Defendant Eric

12

Ogilvie.

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MR. WOJTALA: And good morning, your

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Honor. Jon Wojtala for the People.

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MR. LAWRENCE: Your Honor, I have cited

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several reasons why we feel that Mr. Ogilvie is entitled

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to a reversal for a new trial. One of those reasons or I

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guess several of those reasons involve alleged

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ineffective assistance of counsel and certainly a hearing

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would be required where Mr. Ogilvie would be present to

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pursue that issue.

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However, I'm going to suggest to the Court

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that possibly the hearing isn't needed because of the

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instructional and argument errors that I cited in my

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briefs. Specifically, the case law unanimously holds --

1 I've cited several cases -- that the pointing of a
2 firearm without discharging it is not the use of deadly
3 force.

4 Michigan has something called the
5 self-defense act of 2006, MCL 780.972. The instructions
6 that were given in this case are completely at odds with
7 the self-defense act. Mr. Ogilvie was on his own
8 property. The evidence is clear. The evidence is also
9 clear that according to the 911 call of the African
10 American gentleman, Mr. Watson, was threatening him,
11 pulling a gun and backing him back across his own yard.

12 The instructions to the jury repeatedly
13 spoke about use of deadly force in a situation where no
14 deadly force was used whatsoever. Mr. Ogilvie was
15 deprived of his right to proper jury instructions as well
16 as being deprived of proper argument because his own
17 lawyer basically conceded that which I have shown here is
18 clearly not true as a matter of law.

19 THE COURT: Okay. Counsel, as far as the
20 jury instructions, the jury instructions were submitted
21 and stipulated to by counsel. I'm going to let the
22 prosecutor respond to this part of it and we'll move on.
23 Go ahead.

24 MR. LAWRENCE: Thank you, Judge.

25 MR. WOJTALA: My response, your Honor, is

1 the actual -- a direct challenge to the instructions has
2 been waived because this was agreed to, these
3 instructions, and by stating on the record that he agreed
4 to these particular instructions, defense counsel and the
5 Defendant, therefore, waives this particular issue so
6 there's no issue to even be resolved. Now, there does
7 leave open the ineffective assistance claim.

8 THE COURT: Not only in this case were
9 they not objected to, as I stated on the record, they
10 were requested to, stipulate to and approved by counsel.
11 So we need to move onto a new issue. Go ahead.

12 MR. WOJTALA: As far as the ineffective
13 assistance part of that, your Honor, I did have an
14 opportunity to review the case law in this particular
15 issue. I do not find any published Michigan case that
16 indicates that for the purpose of instructing the jury on
17 self-defense, that pointing a gun is either deadly or
18 nondeadly force.

19 So, therefore, there is no case law to
20 even -- it's a bit of a novel issue. I do acknowledge
21 that there are cases from other states, from other
22 jurisdictions, but none from Michigan. So at least for
23 Michigan it's a novel issue and I -- there is case law
24 also that holds, though, that the failure to raise a
25 novel issue is not ineffective assistance.

1 You're not required as an attorney to
2 raise every known argument that can be made or construct
3 an argument out of hole cloth when there is no law to
4 support that.

5 THE COURT: All right.

6 MR. LAWRENCE: Well, all that I can say
7 is I cited three cases that hold that the pointing of a
8 gun is not deadly force, People V. Hooper, 152 Mich. App.
9 243, People versus Dillard, 115 Mich. App. 640 and the
10 unpublished case found in the appendix, People versus
11 Happy Chandler Miller, Court of Appeals Number 198216.

12 I feel that regardless of what defense
13 counsel did, this Court had a responsibility to see that
14 the jury wasn't misled by lots of argument and
15 instruction on something that never happened, the use of
16 deadly force, and even according to the prosecution
17 testimony and, therefore, it is certainly our position
18 that the error is more than plain and that it directly
19 contradicts Michigan law and the intent of the
20 legislature when they passed the self-defense act of
21 2006, but leaving that aside for the moment, we certainly
22 have several additional bases to show ineffective
23 assistance of counsel.

24 I was hoping that we could short circuit
25 that because the instructional error is so manifestly

1 clear, but --

2 THE COURT: All right. In the factual
3 situation of this case, in the Court's opinion it
4 certainly is not -- and we're handling two issues and so
5 we will separate them. The Court denies your motion on
6 the first issue on the jury instructions.

7 MR. LAWRENCE: Now, with respect to the
8 ineffective assistance of counsel, I believe that the
9 prosecutor agrees that such a hearing should be held and,
10 therefore, I would like to set one. I would also like to
11 see about the possibility of shortly before that hearing
12 setting another date for me to have a hearing for a bond
13 motion for Mr. Ogilvie for a couple of reasons. I don't
14 want to argue the bond motion now, but just let the Court
15 know my client is aware of certain evidence that he --

16 THE COURT: Well, first of all, since
17 you're not going to argue it now let's just take a break
18 and let the prosecutor respond to the general issue of
19 the Ginther Hearing.

20 MR. WOJTALA: As far as the Ginther
21 Hearing, your Honor, there does seem to be materials that
22 Mr. Lawrence was able to obtain that probably do need to
23 be placed on the record. Whether the Court wishes to
24 expand the record through just accepting the materials
25 that were presented with the motion or have a Ginther

1 hearing, I would leave it to the Court, but I do believe
2 that there are at least some materials that need to go
3 into the record that weren't previously mentioned,
4 specifically the 911 information.

5 Now, as far as the actual -- if we hold a
6 hearing on this particular case, your Honor, I do think
7 that there are some issues that have been raised as
8 ineffective assistance that probably do not need to be
9 expanded upon in an actual hearing. So there is room to
10 limit the extent of the Ginther hearing.

11 THE COURT: All right. Well, I would like
12 counsel to communicate with each other and to place on
13 the record what you can agree to and what you cannot so
14 that the Court can better limit or see the realm of
15 the -- of what the hearing must be in this case because
16 there are many issues that were presented to the Court
17 that would be issues of a Ginther Hearing and if there
18 are some that can be just placed on the record and not
19 extended to an adversarial issue then we would want to
20 know that before we start so that we can be concise and
21 cover the issues fully that need to be covered.

22 I have no problem with a Ginther Hearing,
23 but anything that is -- that can be first resolved should
24 be and the limits -- the parameters of what we're
25 presenting on the record should be made at some hearing

1 prior to the Ginther Hearing.

2 MR. LAWRENCE: Very good, Judge. I will
3 consult with Mr. Wojtala and I'll inform the Court that
4 at the present time I would certainly want to call as
5 witnesses at the hearing the defense counsel and the
6 Defendant and very probably the neighbor who made the 911
7 call.

8 THE COURT: That's fine.

9 MR. WOJTALA: I will consult with Mr.
10 Lawrence and if we have a date that we can come back and
11 either indicate to the Court that the issues that we've
12 agreed upon are --

13 THE COURT: All right. And it actually
14 can be the same date as the hearing if you would like to
15 start the hearing.

16 MR. WOJTALA: That's fine.

17 THE COURT: But it doesn't have to be. If
18 you would like, I believe we actually have openings
19 because of some plea negotiations that resolved cases on
20 the 15th and 16th of November.

21 MR. LAWRENCE: Your Honor, I could be --
22 I can certainly be here on the 16th of November. I would
23 like to request that my client be transported down for
24 the hearing and if the Court agreed to do that, then I
25 would file a bond motion that I'd argue at that time. If

1 not then I could argue it on a subsequent day.

2 THE COURT: All right. Because we are
3 very unlikely to have your client be here that soon on
4 the 16th and then there is a long break for Thanksgiving.

5 So, I mean, we can have -- we could have
6 you be here just to present your stipulations and your
7 agreements and the parameters of the hearing on the
8 sixteenth and then possibly have your client here on a
9 bond issue on the 22nd.

10 MR. LAWRENCE: That would be wonderful as
11 long as it's morning.

12 THE COURT: All right. Nine A.M. for both
13 of 'em, 16th and the 22nd, nine A.M.

14 MR. LAWRENCE: Okay. And I presume that
15 by the 22nd we'll set a date for the final actual
16 hearing?

17 THE COURT: Yes.

18 MR. LAWRENCE: Thank you, very much, your
19 Honor.

20 THE COURT: Thank you, very much.

21 (10:31 A.M. proceedings concluded)

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C E R T I F I C A T E

STATE OF MICHIGAN)SS
COUNTY OF WAYNE)

I, Annette L. Seguin, Certified Shorthand
Reporter-2184, do hereby certify that the forgoing pages,
1 through 11, inclusive, comprise a full, true and
correct transcript, of the proceedings in the matter of
People vs. Eric Ogilvie, taken on November 5, 2010.

ANNETTE L. SEGUIN, RPR/CSR-2184
Official Court Reporter

DATED: May 27, 2011